IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§ Civil Action No. H-01-3624 § **(Consolidated)** § § CLASS ACTION
This Document Relates To: MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	§

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PRECLUDE THE FILING OR PRODUCTION OF DOCUMENTS SUBJECT TO A PROTECTIVE ORDER

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I. INTRODUCTION

The Regents of the University of California ("The Regents"), as Lead Plaintiff and on behalf of all plaintiffs consolidated thereunder,[1] respectfully submits this Memorandum of Law in Support of Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order. Plaintiffs seek this relief in the interest of providing full access to these proceedings for absent class members, the legal and financial communities, regulatory bodies and the public at large. "As Justice Brandeis so aptly observed in 1914, 'publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.' L. Brandeis, *Other People's Money and How the Bankers Use It* 89 (1914) (Reprinted by Bedford Books of St. Martin's Press 1995). This important truth, *i.e.*, the necessity of exposing societal ills to the scrutiny of public attention, has endured throughout the years." *Doe v. Chicago Police Officer*, 202 F.R.D. 233, 238 (N.D. Ill. 2001) (granting third-party petitioner access to documents produced during discovery).

To say that this case has far reaching implications for investors, pension funds, class members, academics, businessmen, historians, policy makers and government officials would be an understatement. In light of the prominence, magnitude and importance of Enron's financial scandal that underlies this litigation, and the widespread impact the Enron debacle has and will continue to have upon our nation's ongoing debate over the causes and impact of the current upsurge in corporate financial and accounting fraud, public access to these proceedings is critical. As put by one of the nation's most respected newspapers:

> The most spectacular corporate demise ever cannot remain a befuddling mystery. ***In order to restore confidence in American capitalism and in the integrity of its financial markets, the public needs to understand what brought Enron down*** so suddenly last year. How could the Houston-based energy company, ranked seventh on the Fortune 500 list of America's largest companies, and often touted as

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[1]Plaintiffs include: Washington State Investment Board, San Francisco City and County Employees' Retirement System, Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund, Hawaii Laborers Pension Plan, Staro Asset Management LLC, Amalgamated Bank, Robert V. Flint, John Zegarski, Mervin Schwartz, Jr., Seymour Berman, Steven Smith, the Archdiocese of Milwaukee Supporting Fund, Inc., and those plaintiffs listed in Exhibit A to the Consolidated Complaint. In addition to The Regents, these plaintiffs are collectively referred to herein as "Plaintiffs."

> one of its most innovative, fail so unexpectedly, wiping out $60 billion in shareholder value?
>
> Congress is appropriately holding a number of hearings to seek answers to that question. Enron's financial bankruptcy, triggered in part by revelations of faulty financial reporting, was a shocking national calamity. ***Its post-mortem, which will take the form of*** a Securities and Exchange Commission investigation and ***private lawsuits*** as well as the Congressional hearings, ***is likely to reveal serious deficiencies in how the public interest is protected on an array of regulatory fronts***. It may lead to new federal regulations of pension plans, accounting procedures and energy markets.

Editorial Desk, "The Enron Post-Mortem," *N.Y. Times*, Jan. 4, 2002, at A20 (attached hereto as Ex. A).[2]

In this unparalleled case, the public (including class members) must be allowed to observe how the justice system works to sort out the facts and circumstances surrounding Enron's collapse in order to determine what happened, why it happened and the extent to which our nation's laws were violated in the process. Public access must be provided the highest priority here in order to preserve the integrity of the federal litigation process. Any request to keep documents in this case cloaked in secrecy pursuant to a protective order cannot overcome the presumption of the public's right to scrutinize these proceedings and Plaintiffs' statutory rights to communicate with the absent class members and the public at large without undue obstruction, rights that have constitutional dimensions. The facts of this case present a most compelling circumstance for full disclosure – complete public access. Secrecy can only compromise the integrity of the judicial process without any offsetting benefit. The absence of full disclosure was undoubtedly a fundamental cause of the Enron debacle – a mistake that should not be repeated in the administration of this litigation.

II. ARGUMENT

A. Strong Interests Weigh in Favor of Maintaining the Openness of These Proceedings; the Issuance of a Protective Order to Secrete Discovery Materials or Court Filings Is Not Legitimately Justifiable

> "Though the publication of such [civil] proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings."

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[2]Unless otherwise noted, all emphasis is added, and all citations and footnotes are omitted.

Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.).

As demonstrated below, the law presupposes public scrutiny and review of judicial proceedings. The need for openness in this action is of historic proportions[3] and the Court's exercise of its discretion ought to err on the side of complete openness rather than restricting the public's access to these proceedings in any way.

In weighing whatever minimal interest the defendants may have in secreting the evidence of their involvement with Enron and apparent securities law violations ***from the public***, the Court must consider that this case involves a ***public corporation, public offerings*** and laws dedicated not only to full and honest ***public disclosure*** but also enhancing the ethics of all aspects of the securities industry. Indeed, the purpose of the federal securities laws and regulations is the protection of both honest enterprises and public investors.

> The purpose of this bill is to protect the investing public and honest business .... The aim is to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation; to place adequate and true information before the investor; to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion; to restore the confidence of the prospective investor in his ability to select sound securities; to bring into productive channels of industry and development capital which has grown timid to the point of hoarding; and to aid in providing employment and restoring buying and consuming power.

S. Rep. No. 47, 73d Cong., 1st Sess., at 1 (1933).[4] The secretion of evidentiary documents in this class action, filed on behalf of thousands and thousands of investors, is inconsistent with the fundamental precepts of the securities laws, which were passed to prevent public company fraud,

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[3]*See* John C. Coffee, Jr., "Guarding the Gatekeepers," *N.Y. Times*, May 13, 2002, at A17 (labeling the "collapse of Enron" a "[m]ajor debacle[] of historic dimensions") (attached hereto as Ex. B); David Wessel, "What's Wrong? – Venal Signs: Why the Bad Guys of the Boardroom Emerged en Masse – The Stock Bubble Magnified Shifts in Business Mores While Watchdogs Napped – Galbraith Explains the 'Bezzle,'" *Wall St. J.*, June 20, 2002, at A1 ("[T]he scope and scale of the corporate transgressions of the late 1990s, now coming to light, exceed anything the U.S. has witnessed since the years preceding the Great Depression.") (attached hereto as Ex. C).

[4]*See also SEC v. Zandford*, __ U.S. __, 122 S. Ct. 1899, 1903 (2002) ("Among Congress' objectives in passing the [Securities Exchange] Act was 'to insure honest securities markets and thereby promote investor confidence' ...."); *Shores v. Sklar*, 647 F.2d 462, 470 (5th Cir. 1981) ("[T]he purposes of the securities acts and rule 10b-5 are far broader than merely providing full disclosure or fostering informed investment decisions. The Supreme Court has held that the acts were designed 'to protect investors against fraud and to promote ethical standards of honesty and fair dealing. *See* H.R.Rep.No. 84, 73d Cong., 1st Sess., 1-5 (1933).'").

remedy it when it occurs and to instill investors with confidence in the fundamental belief that fraudulent actors will be held accountable.

It is beyond debate that this case is being closely watched by investors, policy makers, legislators, class members and the public in general. The contemporary landscape is all too littered with graphic illustrations of the very substantial amount of "economic fraud" and "corporate crime" taking place in our deregulated financial marketplace – the cost of which will be borne by the public and raises issues much larger than the legal rights of the parties to these proceedings.[5] In our economy, the competition for investor dollars by public companies, banks, money market funds, mutual funds and others is intense. Indeed, the dramatic increase in public offerings in the late 1990s indicates a substantial rise in the number of public corporations vying for investors' savings and the growing importance of the publicly-held corporation to the economy and our society. Increasingly, a substantial percentage of "normal" United States citizens' wealth is invested in publicly owned

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[5]For example, shortly after Enron's fall, *Fortune* echoed the sentiments of many experts when it reported:

> [Enron's] collapse has forced us to shine a halogen light on the books of America's public companies, and what we're seeing sure ain't pretty. In the last couple of days of January alone, stocks of Tyco, Cendant, Williams Cos., PNC, Elan, and Anadarko were brutally punished for alleged or acknowledged accounting problems.
>
> ***The price we, the public, pay for all this is absolutely mind-boggling***. Former SEC chief accountant Lynn Turner, who's now teaching at Colorado State University, estimates that over the past six years, the cost to investors – in terms of stock market losses – of financial restatements is well over $100 billion. And that doesn't include Enron, which is in a league of its own. As Turner points out, the cost of Enron's failure is roughly six times the $15 billion loss suffered from Hurricane Andrew.
>
> But ***the ultimate cost could be much larger***. If Wall Street's growing anxiety about the quality of corporate earnings leads to lower multiples, CEOs will face increased pressure to maintain earnings by cutting back on things like capital spending, dealing a potentially lethal blow to the recovery. "I'm deeply worried about the effect of Enron on business confidence," says the CEO of a major technology company.
>
> It is an environment that disturbs even the most seasoned Wall Street hands. "It's hard for me not to be angry," says Goldman Sachs' CEO, Hank Paulson, with regard to Enron and others that cross the line. "It's an issue of reputational impairment. Accounting is the lifeblood of our capital markets system, and we have a great need for improvement."

Andy Serwer, "Dirty Rotten Numbers," *Fortune*, Feb. 18, 2002, at 74 (attached hereto as Ex. D).

securities.[6] Pension plans – both public and private – hold the retirement savings of most Americans. The huge decline in our securities markets – due in no small part to fraudulent financial reporting – has had a substantial negative impact not only on these investors but on the U.S. economy as a whole. It is no secret that investors' confidence in the markets has been diminished by recent disclosures of fraud committed by corporate insiders, accountants and investment banks – the major players in our capital markets.[7] The importance of investor confidence to the health of our capital markets, and therefore our economy, is critical.[8] The implications are truly global, as America's markets have long been presented as the economic model by which the world should judge

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[6]"[A]bout half of all adult Americans" now make up what *BusinessWeek* has labeled the "new Investor Class that has emerged over the past decade," which has a substantial portion of their wealth invested in public companies like Enron. Made up predominantly of middle class, baby boomers, the "Investor Class boomed in the 1990s as more and more people plunged into the market." Marcia Vickers, "The Betrayed Investor," *BusinessWeek*, Feb. 25, 2002, at 104 (attached hereto as Ex. E).

[7]*See, e.g.*, Vickers, *supra* note 6 ("Today, the Investor Class is angry and disillusioned because it feels betrayed. On the heels of Enron Corp.'s Dec. 2 bankruptcy filing – America's biggest ever – they are questioning the very integrity of the financial system."); Gretchen Morgenson, "The Enforcers of Wall St.? Then Again, Maybe Not," *N.Y. Times*, June 20, 2002, at C1 ("Investors' faith in the financial markets has been shaken by failures in safeguards intended to protect the public. As a self-regulated industry, the brokerage business employs cops inside its walls as a first line of defense for investors. But regulators and investors are wondering if those cops are encouraged to identify wrongdoing by an individual or group that produces significant revenues.") (attached hereto as Ex. F); "The Value of Trust – Wall Street," *The Economist*, June 6, 2002 ("Investors have had their confidence bashed ....") (attached hereto as Ex. G); Joseph Nocera et al., "System Failure; Corporate America has lost its way. Here's a road map for restoring confidence," *Fortune*, June 24, 2002, at 62 ("Nearly every known check on corporate behavior ... fell by the wayside, marked by the stupendous greed that marked the end of the bubble. And that has created a crisis of investor confidence the likes of which hasn't been seen since – well, since the Great Depression.") (attached hereto as Ex. H).

[8]*See, e.g.*, John A. Byrne, "How To Fix Corporate Governance," *BusinessWeek*, May 6, 2002, at 68 ("Unchecked, that rising [investor] bitterness and distrust could prove costly to business and to society. ***At risk is the very integrity of capitalism***. If investors continue to lose faith in corporations, they could choke off access to capital, the fuel that has powered America's record of innovation and economic leadership. The loss of trust threatens our ability to create new jobs and reignite the economy. It also leaves a taint on the majority of executives and corporations who act with integrity.") (attached hereto as Ex. I); Marcia Vickers and Mike France, "How Corrupt Is Wall Street?," *BusinessWeek*, May 13, 2002, at 36 ("***The entire economy depends on the financial system*** to raise and allocate capital. And that financial system, in turn, is built on the integrity of its information. Should investors lose confidence in that information, it could deepen and prolong the bear market, as wary investors hesitate to put money into stocks. And it could easily put a damper on the economy if companies are less willing – or less able – to raise capital on Wall Street.") (attached hereto as Ex. J); John A. Byrne, "Restoring Trust in Corporate America," *BusinessWeek*, June 24, 2002, at 30 ("'Integrity is the cornerstone, if not the bedrock, upon which all financial markets are based.'") (quoting Henry M. Paulson, Jr., CEO of Goldman, Sachs & Co.) (attached hereto as Ex. K).

itself – and the world is now watching.[9] For these reasons, now more than ever, investors – whether the unsophisticated individual or the behemoth institution – must receive the protections of the federal securities laws and must be able to see for themselves that these laws are there to protect them – and actually do operate to protect them – or to see that these positive attributes are not actually present, so that they can take whatever political action is necessary to fix that situation.

The need for effective enforcement of the federal securities laws has never been greater. The effectiveness of the enforcement of these laws is being critically scrutinized by lawmakers and the public. Because we live in an era of widely publicized budgetary constraints resulting in reduced governmental regulation of the national securities markets and less vigorous regulatory enforcement of the securities laws, effective enforcement falls ever more on the private bar.[10] The efficacy and integrity of the private securities bar, however, has been under unrelenting attack in recent years and has been the subject of controversial legislative action.[11] These concerns reflect poorly on the whole

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[9]*See* "An Economy Singed," *The Economist*, June 20, 2002 (Discussing the upcoming G8 Summit and noting: "Disappointment and anxiety have prompted investors, particularly foreigners, to re-examine America's economic model in a new and more critical light.") (attached hereto as Ex. L).

[10]A recent article in *Fortune* noted:

> As any careful newspaper reader can tell you, the Securities and Exchange Commission has launched one probe after another in recent months. (Indeed, the rate of new investigations from January to March was double that of the first quarter of 2001.) ***But the agency's enforcement staff is stretched so thin that many of the investigations are likely to fall by the wayside. It sounds like a parable from Sun Tzu: An army that is everywhere is an army nowhere.***
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> Consider the SEC's mandate as sheriff of Wall Street. The agency by law is charged with reviewing the financial filings of 17,000 public companies, overseeing a universe of mutual funds that has grown more than fourfold (in assets) in the past decade, vetting every brokerage firm, ensuring the proper operation of the exchanges, being vigilant against countless potential market manipulations, insider trading, and accounting transgressions – and investigating whenever anything goes wrong. Yet as the $12 trillion stock market becomes ever more complex, the SEC hasn't been given enough resources even to read annual reports. Seriously. One of the agency's chief accountants admitted in a speech last year that only one in 15 annual reports was reviewed in 2000. Take your guess on Enron.

Joseph Nocera et al., *supra* note 7 (attached hereto as Ex. H).

[11]*See generally* Stephen Labaton, "Now Who, Exactly, Got Us Into This?," *N.Y. Times*, Feb. 3, 2002, at C1 (discussing implications of and justifications for passage of the Private Securities Litigation Reform Act of 1995) (attached hereto as Ex. M).

judicial system. Yet, the public does not trust the other branches of government or the private market to reign in corporate fraud.[12] Therefore, there is a need for these proceedings to be ***open*** so that the public may assess the effectiveness of our federal securities laws, our judicial system and private enforcement.

Secreting discovery documents produced in a securities class action as high profile as this one will shroud in secrecy defendants' conduct in the Enron debacle. Concealing this type of critical evidence deprives scholars and policymakers of the underlying factual evidence of each defendant's actions and interferes with an objective evaluation of their conduct. Indeed, Plaintiffs believe that, given the representative nature of this action and the public, academic and media interest in securities class actions as a whole (and this case in particular), it is important for the public and class members to have an opportunity to learn just how seriously and deliberately the defendants breached their obligations under the securities laws, while engaging in massive "insider selling." On the other hand, if the evidence exonerates them – shows they were innocent victims of a corporate collapse due to non-fraudulent factors – then their reputations will benefit. Either way, the true facts of what happened should be public.

Furthermore, the fact of the matter is that many of the defendants will continue to be involved in publicly-held companies. Thus, some of Enron's directors, lawyers and bankers will continue in positions of power and trust. This case represents one of the means by which investors will learn who is to be blamed for the Enron debacle and which of the defendants should not be trusted with the responsibilities involving public companies.[13] Only by gaining access to the documents

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[12]*See* Peter Coy, "Investors Are Still Spooked,"*BusinessWeek*, June 24, 2002, at 38 ("American investors remain pessimistic about the stock market, and only 4% are very confident of the accuracy of corporate earnings statements. But they're torn about what should be done. ***More than half doubt that corporations can reform themselves without new laws and regulations. Yet their trust in the ability of Congress and federal agencies to regulate corporate financial practices is even lower than their confidence in Arthur Andersen and other auditors***.") (attached hereto as Ex. N).

[13]Statistics indicate that many of the defendants will never be subjected to the scrutiny of a criminal prosecution; to the chagrin of investors and honest business-people alike, white collar criminals rarely are prosecuted. *See* Clifton Leaf, "Enough is Enough; White-Collar Criminals: They Lie They Cheat They Steal and They've Been Getting Away With It For Too Long," *Fortune*, Mar. 18, 2002, at 60 (attached hereto as Ex. O).

underlying these proceedings, will the public and academics truly be able to parse out and understand the true culpability of each defendant Only then will they be able to learn from Enron.

B. Transparency in This Action Is Presumed; This Presumption Must Not Be Overturned Based on the Facts in This Case

As demonstrated above, the realities of this case establish an overwhelming necessity that these proceedings be open to the full review and scrutiny of the media, investors, absent class members, other branches of government, scholars and historians. The law recognizes and accommodates these important public goals of the judicial process, even where a legal action is between purely private parties, which this is not.[14]

1. The Public Has Both a Common Law and Constitutional Right to Access the Full Judicial Record

In these proceedings, the public at large clearly has a right of access to the entire record in this case. "It is well settled that there exists, in both criminal and civil cases, a common law public right of access to judicial proceedings and records." *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001) (federal securities class action). Furthermore, "[t]he public's right of access extends beyond simply the ability to attend open court proceedings [and] [r]ather, ... envisions 'a pervasive common law right "to inspect and copy public records and documents, including judicial records and documents."'" *Id.* (quoting *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993)); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (holding that right of access to court records arises under both the common law and the First Amendment to the United States Constitution).

Access to such records "serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally." *United States v. Hubbard*, 650 F.2d 293, 315 (D.C. Cir. 1980). As the Seventh Circuit has explained:

> The public's right of access to court proceedings and documents is well-established. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1984); *Nixon v. Warner Communications*, 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978). Public scrutiny over the court system serves to

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[14]Indeed, The Regents, Washington State Investment Board and the San Francisco City and County Employees' Retirement System are ***public*** institutions that are accountable to their constituents and their business is a matter of public concern.

> (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980). Though its original inception was in the realm of criminal proceedings, the right of access has since been extended to civil proceedings because the contribution of publicity is just as important there. *Smith v. United States Dist. Court*, 956 F.2d 647, 650 (7th Cir. 1992). In fact, mistakes in civil proceedings may be more likely to inflict costs upon third parties, therefore meriting even more scrutiny. *Richmond Newspapers*, 448 U.S. at 596 (Brennan, J., concurring).
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> Justified originally by common-law traditions predating the enactment of our Constitution, the right of access belonging to the press and the general public also has a First Amendment basis. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982).

Grove Fresh Distribs. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994). The public's right to access judicial proceedings is so substantial, the Court has recognized standing exists, for example, "in the citizen's desire to keep a watchful eye on the workings of public agencies." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

Plaintiffs do not assert that this public right of access is absolute. Rather, this Court is given discretion to restrict the public's access to judicial records,[15] but our jurisprudence cautions that this power is to be used sparingly and only after a balancing of the interests involved. *See, e.g., Fed. Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987) (While the common law right of access to judicial records is not absolute, "[t]he district court's discretion to seal the record of judicial proceedings is to be exercised charily."); *Grove Fresh Distribs.*, 24 F.3d at 897 ("The First Amendment presumes that there is a right of access to proceedings and documents which have

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[15]This degree of discretion extends to defining what constitutes the judicial record. In *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir. 1987), the court found that the unique nature of class action litigation granted the public a common law right to review documents produced in discovery. *Id.* at 573 and n.13. Citing common law cases for the proposition that "[o]nce a court has relied on material, that material should be disclosed," the court then stated: "The peculiar circumstances of a class action settlement may require a broad interpretation of reliance." *Id.* Because Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of any settlement between the parties to a class action, courts implicitly rely on the lawyers' review of the documents produced in discovery. *Id.* Thus, the court concluded, the "class members should be given access to discovery material so that they may understand why their class representatives urged the Court to approve the settlement." *Id.* This logic is applicable here. Rule 23(d) grants this Court the ongoing authority to act "for the protection of the members of the class or otherwise for the fair conduct of the action." To the degree that this Court must rely on the parties' representations throughout this litigation in acting, or not acting, to benefit the absent members of the class, the documents produced in discovery ought to be considered part of the judicial record and the public afforded access pursuant to their common law right.

'historically been open to the public' .... This presumption is rebuttable upon demonstration that suppression 'is ***essential to preserve higher values and is narrowly tailored to serve that interest.*** ***The difficulties inherent in quantifying the First Amendment interests at issue require that we be firmly convinced that disclosure is inappropriate before arriving at a decision limiting access. Any doubts must be resolved in favor of disclosure.***").[16]

In the present case, defendants can point to no matter of fact or law undermining the demonstrated importance that this Court not issue a protective order secreting any portion of the judicial records of these proceedings. Rather, the only potential interests that could exist in shielding information and documents from public disclosure (*i.e.*, visceral preferences for privacy and to avoid embarrassment on the part of defendants) represent pure makeweight when compared to the public's ***right*** of access to the record in this case. Under such circumstances, and applying any balancing test of the parties' and the public's interests, no protective order on confidentiality should issue.

2. Defendants Cannot Meet the High Burden Demanded by the Federal Rules of Civil Procedure for the Imposition of a Protective Order

a. The Imposition of a Protective Order in this Case Is Inconsistent with Rule 26

Due in part to "the abstract virtues of sunlight as a disinfectant," courts abide by the "'general proposition, pre-trial discovery must take place in the (sic) public unless compelling reasons exist for denying the public access to the proceedings.'" *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th

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[16]*See also Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) ("[W]hile a district court 'has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing interests,' the 'presumption' in such cases favors public access.... Accordingly, before a district court may seal any court documents, we held that it must (1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives."); *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) ("court files should be open to the public" unless the court finds that its records are being used for "improper purposes"); *In re Papst Licensing, GmbH, Patent Litig.*, MDL 1298, 2001 U.S. Dist. LEXIS 15183, at *7 (E.D. La. Sept. 17, 2001) ("A party's desire to shield information from competitors and the public 'cannot be accommodated by courts without seriously undermining the tradition of an open judicial system'" and, therefore, to keep documents confidential, a party bears the burden of demonstrating that any "'interests favoring nondisclosure'" outweigh "the public's 'common law right of access.'").

Cir. 1980).[17] A protective order may only be issued upon a showing of "good cause." Fed. R. Civ. P. 26(c). "The implication is clear that without a protective order materials obtained in discovery may be used by a party for any purpose, including dissemination to the public." *In re Halkin*, 598 F.2d 176, 188 (D.C. Cir. 1979), *aff'd sub nom., Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982). "Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order indicates that 'the burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.'" *In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998); *see also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994) (the burden is on the party seeking a protective order to demonstrate a "'clearly defined and serious injury'" as to "each and every document sought to be covered"). Defendants cannot meet this burden.

"To be sure, Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.... The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). However, damage to goodwill or reputation generally is not sufficient to satisfy the "good cause" requirement. *See generally Smith v. BIC Corp.*, 121 F.R.D. 235, 242-43 (E.D. Pa. 1988), *aff'd in part and rev'd in part on other grounds*, 869 F.2d 194 (3d Cir. 1989) (noting that prior adverse publicity limited impact of further release of information obtained in discovery).

"In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process." *Pansy*, 23 F.3d at 787. "A factor which a court should

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[17]Quoted approvingly by *Bell v. Chrysler Corp.*, No. 3:99-CV-0139-M, 2002 U.S. Dist. LEXIS 1651 (N.D. Tex. Feb. 1, 2002) (overturning stipulated protective order to allow plaintiff in a related third party action access to documents produced in discovery); *see also Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999) ("[m]ost cases endorse a presumption of public access to discovery materials"); *Westchester Radiological Ass'n P.C. v. Blue Cross/Blue Shield of New York, Inc.*, 138 F.R.D. 33, 36 (S.D.N.Y. 1991) (absent showing of good cause, discovery "should be publicly available whenever possible"); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 403 (W.D. Va. 1987) (discovery "should be available to the public").

consider in conducting the good cause balancing test is ... whether the case involves issues important to the public." *Id.* at 788. Furthermore, "[e]ven when good cause for the issuance of a protective order is shown, the decision to grant such an order lies in the discretion of the court." *In re "Agent Orange"*, 104 F.R.D. at 572. In the present case, the proven adage extolling the "virtues of sunlight as a disinfectant" is most apt. As demonstrated above, the great weight of the public's interest should override any concerns for defendants' already sullied reputations. Indeed, one of the best means of preventing future fraudulent actions by defendants is to further expose the truth underlying the heretofore pristine reputations of these bankers, lawyers, accountants and senior management and directors of Enron. As it is often said that a business or professional person's reputation is their stock in trade, this Court ought to allow the public to fully scrutinize the propriety of defendants' actions so that those reputations are forced to earn their mettle and the markets may function with the information necessary to make informed decisions as contemplated by the federal securities laws.

b. The Imposition of a Protective Order in this Case Is Inconsistent with Rule 23

Any protective order in this case would substantially limit Plaintiffs' and their counsel's ability to communicate with the persons to whom they owe a substantial duty – the members of the proposed class.[18] In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the Supreme Court, in a unanimous decision, placed a heavy burden upon district courts to justify restricting communications between a class representative, class counsel and the members of the class.[19] The Court held:

> [A] district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties. But ***this discretion is not unlimited***, and indeed is bounded by the relevant provisions of the Federal Rules. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

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[18] *See Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001) ("[P]utative class members stand at least in a fiduciary relationship with class counsel.") (citing *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995)).

[19] While the Court cautioned district courts to consider constitutional implications in issuing protective orders, the Court's decision was predicated on Rule 23, not the First Amendment. *See* 452 U.S. at 103-04 ("Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression. This fact, at minimum, counsels caution on the part of a district court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses.").

> ... [A]n order limiting communications between parties and potential class members should be based on a clear record and ***specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties***. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing – ***identifying the potential abuses being addressed*** – should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances. As the court stated in *Coles v. Marsh*, 560 F.2d 186, 189 (CA3), cert. denied, 434 U.S. 985 (1977):
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> > "[To] the extent that the district court is empowered ... to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record showing by the moving party of ***the particular abuses by which it is threatened***. Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties."
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> ...***[T]he mere possibility of abuses does not justify*** routine adoption of a communications ban ***that interferes with*** the formation of a class or ***the prosecution of a class action*** in accordance with the Rules.

Id. at 100, 101-02, 104.

The holding of *Gulf Oil* is broad, and governs not only restrictions on contacting potential or actual class members, but governs court imposed limits to the content of those communications. In *Williams v. Chartwell Fin. Servs.*, 204 F.3d 748 (7th Cir. 2000), the court considered a protective order preventing "documents marked as confidential from being used for any purpose other than prosecuting or defending this action" and prohibiting "plaintiffs from contacting members of the putative class." *Id.* at 759. Citing *Gulf Oil* for the proposition that "any discovery limitations should be carefully drawn," the Seventh Circuit found the district court's record void of any meaningful balancing of the interests required for such a protective order and vacated that order. *Id.* The issuance of a protective order, including a limitation on the disclosure of documents produced in discovery, must comply with Rule 23. *See id.; see also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 892 (E.D. Pa. 1981).

In this case, Plaintiffs represent thousands of investors with a substantial interest in the outcome of this case. Plaintiffs and Plaintiffs' counsel have a duty to represent the interests of those investors, and a desire to demonstrate that they are adequately doing so. In furtherance of that goal,

Plaintiffs' counsel has established a website to make available numerous important documents in this litigation.[20] The Regents has spoken publicly about its decisions concerning this litigation and the underlying basis for those decisions, in great part to inform class members that The Regents takes its role as an overseer of this litigation very seriously. Additionally, the facts of this case – the combination of an ambitious litigation schedule, a large class and an apparent class member thirst for constant updates on the litigation – has made reasonable dissemination of information only possible via the medium of mass media. In effect, a protective order limiting Plaintiffs' ability to communicate with class members, the content of those communications, or the documents (be they filed with the Court or merely raw discovery documents) that Plaintiffs could reference or disclose during those communications, would substantially limit Plaintiffs' ability to perform their duties.

3. Plaintiffs Maintain a Constitutional Right to Free Speech that Would Be Unduly Burdened by the Issuance of a Protective Order

"The Court ... recognizes that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment." *Seattle Times Co. v. Rhinehart*, 467 U.S. at 37 (Brennen, J., concurring). Before restricting this fundamental constitutional right, "it is necessary to consider whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'" *Id.* at 32 (majority opinion).[21] Defendants can point to no "important or substantial" governmental interest that justifies restricting the overwhelming First Amendment interests at issue in this case.

In *Seattle Times*, the Court reviewed a protective order governing the dissemination of documents acquired via the discovery process under Rule 26. *See* 467 U.S. at 36. In *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) (*en banc*), *aff'd*, 452 U.S. 89 (1981), the Fifth Circuit reviewed

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[20]While this website only contains publicly available documents at the present time, Plaintiffs' counsel believes that it may wish to make certain underlying documents (such as documents produced in discovery) available on this website at the appropriate time.

[21]Plaintiffs' First Amendment right is separate and apart from that of the public to access Court records and proceedings, as discussed above.

a protective order in the context of a class action under Rule 23; it viewed the "prior restraint" on the parties' ability to communicate with class members with a great deal of skepticism.[22]

In *Bernard*, the Fifth Circuit vacated and reversed the district court's imposition of a protective order "limiting communications by parties and their counsel with actual or potential class members." 619 F.2d at 464. The *en banc* panel reasoned that an order limiting communications with members of a class, even though the class was not certified, was deemed to be "the essence of [a] prior restraint" because it placed "specific communications under the personal censorship of a judge." *Id.* at 473.[23] The Fifth Circuit's analysis was as follows:

> In general, ***a prior restraint may be justified only if the expression sought to be restrained "surely (will) result in direct, immediate, and irreparable damage***." *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 833 (5th Cir. 1979), quoting *New York Times Co. v. U. S.*, supra, 403 U.S. at 730, 91 S. Ct. at 2149, 29 L. Ed. 2d at 834.
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> To be lawful, the restraint "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints," *Southeastern Promotions, Ltd. v. Conrad*, supra, 420 U.S. at 559, 95 S. Ct. at 1247, 43 L. Ed. 2d at 459; that is, "(the) publication (sought to be restrained) must ***inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety*** of a transport already at sea...." *New York Times Co. v. U. S.*, supra, 403 U.S. at 726-27, 91 S. Ct. at 2148, 29 L. Ed. 2d at 832 (Brennan, J., concurring); *see also Whitney v. California*, 274 U.S. 357, 377, 47 S. Ct. 641, 71 L. Ed. 1095, 1106 (1927) (Brandeis, J., concurring) ("Only an emergency can justify repression"). Indeed, one commentator has interpreted *New York Times v. U. S.* to hold that "there is a constitutional requirement that everything, or virtually everything, is entitled to be published at least once." *Kalven*, supra, 85 Harv.L.Rev. at 34.
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> ***[A protective] order is not brought within any exception permitting prior restraints merely because it arises in the general context of the administration of justice and the particular context of Rule 23***. As the Third Circuit noted in Rodgers I : "(T)he interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." 508 F.2d at 163.
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[22]The circuit court holding in *Bernard* withstood the decision of *Seattle Times* and is still binding precedent. *See United States v. Brown*, 218 F.3d 415 (5th Cir. 2000), *cert denied*, 531 U.S. 1111 (2001) (discussed *infra*).

[23]*See also Basco v. Wal-Mart Stores, Inc.*, No. 00-3184, 2002 U.S. Dist. LEXIS 3780, at *9 (E.D. La. Feb. 22, 2002) ("An order limiting communications between parties and class members however, is a prior restraint on speech.") (citing *Burrell v. Crown Cent. Petroleum*, 176 F.R.D. 239, 243 (E.D. Tex. 1997)).

> ... The validity of a prior restraint entered under Rule 23 must be tested by the same standards utilized in other contexts. Subdivision (d) of Rule 23, which authorizes the court, in its discretion, to make appropriate orders in class actions, was designed to further "the fair and efficient conduct of the action...." Advisory Committee Notes to Rule 23.... [T]he court's discretion under Rule 23 is a facet of its general authority to regulate the conduct of litigation.... ***We cannot interpret Rule 23 as authorizing prior restraints without rewriting the First Amendment*** and the gloss put upon it by the Supreme Court. This, of course, we are not at liberty to do. Moreover, the Rules Enabling Act, 28 U.S.C. § 2072, explicitly provides that the Rules "shall not abridge, enlarge or modify any substantive right." Finally, much of the communication prohibited by the order is both constitutionally protected and consistent with the purposes of the class action.

Id. at 473-74. In the present situation, defendants can show no "***direct, immediate, [or] irreparable damage***" justifying any limitation on Plaintiffs or Plaintiffs' counsel's right to freely communicate with members of the proposed class.

Plaintiffs anticipate that defendants may cite *Brown*, 218 F.3d 415, for the proposition that this Court should put a gag order on the parties to preserve defendants' right to a fair trial. In *Brown*, the Fifth Circuit upheld a district court's "gag order prohibiting parties, lawyers, and potential witnesses from giving to 'any public communications media' 'any extrajudicial statement or interview' about the trial (other than matters of public record) that 'could interfere with a fair trial or prejudice any defendant, the government, or the administration of justice.'" *Id.* at 418. Defendants, however, cannot meet the standard established in *Brown*. ***First***, defendants must overcome the presumption that a restriction on communications about the case is unconstitutional. The *Brown* court stated: "[G]ag orders ... exhibit the characteristics of prior restraints. Prior restraints – 'predetermined judicial prohibition restraining specified expression' – ***face a well-established presumption against their constitutionality***." *Id.* at 424-25 (quoting *Bernard*, 619 F.2d at 467) (discussed above).

Second, *Brown* required the district court to show a "substantial likelihood" that the jury pool would be tainted and, while the facts in *Brown* were clearly more dire than those before this Court, the *Brown* court found its decision a "close call."[24] In reviewing the case, the Fifth Circuit

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[24] "***While this case presents a somewhat close call***, we conclude that the gag order is constitutionally permissible because it is based on a reasonably found ***substantial likelihood*** that comments from the lawyers and parties might well taint the jury pool, either in the present case or one of the two related cases, is the least restrictive corrective measure available to ensure a fair trial, and is sufficiently narrowly drawn." *Id.* at 423.

emphasized that the existence of three related, simultaneous criminal trials pending in the same district "created a heightened and ***somewhat unique*** danger of tainting any one of the three juries, as well as the parties' ***self-proclaimed willingness to seize any opportunity to use the press to their full advantage***, justified the district court's conclusion that there was at least a 'substantial likelihood' that allowing further extrajudicial statements by the parties would materially prejudice the court's ability to conduct a fair trial." *Id.* at 429.[25] The present case before the Court is not a criminal action. Further, The Regents and its counsel have acted appropriately in trying to balance its obligation to inform absent class members of the case with its obligations to maintain a sense of decorum in its dealings with the media that is fitting of the respect it owes this Court.[26] Finally, as detailed above, the necessity for the parties to freely discuss the case is substantially greater than that in *Brown*.

C. If the Court Deems it Necessary to Issue a Protective Order in These Proceedings, that Order Should Be Drafted As Narrowly As Possible

As the Court explained in *Holland v. Summit Autonomous, Inc.*, No. 00-2313, 2001 U.S. Dist. LEXIS 12659, at *2 (E.D. La. Aug. 14, 2001), *aff'd*, No. 00-2313, 2001 U.S. Dist. LEXIS 15732 (E.D. La. Sept. 21, 2001) the following three types of protective orders are issued by courts when faced with a request for such entry:

> "The narrowest is a protective order covering specific, identified information. With a narrow protective order, the court usually reviews the protective material, so it is clear that 'good cause' existed for the protective order.

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[25]A government lawyer stated that he would "match any attempts by the defendants to gain an upper hand in the media coverage of the case." *Id.* at 429.

[26]A review of the media reports covering this case demonstrate that The Regents and its counsel have exercised considerable restraint, while certain defendants have not. Defendants have gone so far as to argue the merits. *See, e.g.*, Miriam Rosen, "V&E Reacts to Enron Shareholders' Latest Allegations," *Texas Lawyer*, June 17, 2002 (attached hereto as Ex. P), quoting extensively a Vinson and Elkins partner stating: "'We wouldn't be in this case except for two things: Enron went into bankruptcy, and Arthur Andersen lost its viability. The plaintiffs didn't add us until later. They are looking for somebody to blame.'" "'We were not in a position to evaluate what was arm's length. We have never been aware of any secret no-loss agreements.'" "'We don't have any reason to believe that they [Kirkland & Ellis] didn't play an independent role, and we don't know who paid their legal fees. It would not be unusual, however, for a company, as part of the business transaction, to pay their opposing side's legal fees.'" And quoting a Milberg Weiss partner's response: "'We're not going to debate the case in the press.'"

> At the other extreme is an 'umbrella' protective order that designates all discovery as protected, without any review or determination of 'good cause' by the parties or the court. 'Umbrella' protective orders are disfavored, and on a motion for modification, the burden generally will be on the party seeking protection to show good cause....
>
> Between those two extremes is a 'blanket' protective order that permits the parties to protect documents that they in good faith believe contain trade secrets or other confidential commercial information. Such protective orders are routinely agreed to by the parties and approved by the courts in commercial litigation, ***especially in cases between direct competitors***...."

Id. at *5-*6 (quoting *Bayer AG v. Barr Lab.*, 162 F.R.D. 456, 465 (S.D.N.Y. 1995)). As explained above, given the facts of this case and the public's interest in these proceedings, even a "blanket" protective order can not be justified. *See also Pansy*, 23 F.3d 772 (holding that there is a strong presumption against granting a protective order where the public normally would have access to information).

If any protective order is to be permitted, the Court should require a "narrow" protective order that requires the party designating the document as "confidential" or "highly confidential" to submit it to the Court for *in camera* review and show ***good cause*** why the document should be provided such protection.[27] Plaintiffs are unwilling to voluntarily agree to even a "narrow" protective order in light of the public importance of this case and to fully protect its rights. *See Longman v. Food Lion, Inc.*, 186 F.R.D. 331 (M.D.N.C. 1999) (holding that plaintiffs who agreed to protective order sealing certain documents were estopped from raising public access or First Amendment concerns in effort to unseal record).

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[27]Undoubtedly, defendants will assert that a protective order is necessary because they will be required to produce "trade secrets." Not only is this hard to believe, it is inconsistent with the law. ***First***, Enron is in bankruptcy and has stated that it will reinvent itself as a much different company (thus leaving no need to protect any "trade secrets"); and, it's difficult to imagine what trade secrets accountants, lawyers and bankers maintain. ***Second***, as demonstrated above, Rule 26 requires that defendants come forth with a specific reason justifying the Court's exercise of its discretion as to each document they wish to secrete; the same is true for documents purported to be trade secrets. "***Whether trade secrets are involved or not, and whether their revelation will cause damage to someone, are questions of fact, to be decided after receiving evidence. In such an important matter, courts should not simply take representations of interested counsel on faith.***" *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 663 (8th Cir. 1983). Furthermore, experience shows that, when parties are given broad discretion to designate documents as confidential, they frequently deem documents confidential that do not merit this protection. *See, e.g., Zenith Radio*, 529 F. Supp. at 873-82.

III. CONCLUSION

Any effort to restrict the flow of information to the public concerning this case should be viewed with skepticism. Public interest in these proceedings is extremely high and the obligations of The Regents and its counsel to represent the interests of absent class members necessitates the continued and uninterrupted free exchange of information and documents that provide the "transparency" by which class members and the public may monitor this action. In contrast, the legitimate interests, if any, of defendants in maintaining the secrecy of documents and information are minimal in comparison. As this Court has recognized, "the eyes of the nation are on this Court and the ... justice system to see if [the Court is] up to the challenge." *See* Scheduling Order in Civil Action dated February 27, 2002 at 2. The nation is viewing these proceedings for good reason; it wishes to learn from this catastrophe and to demonstrate to itself and the world that America's model economy and financial markets, while not perfect, respond openly and honestly to crises and that they deserve to remain the recipient of worldwide confidence, investment and emulation. Accordingly, the Court should reject any effort by defendants to impose a broad restriction on the flow of information to the public and, instead, should require defendants to produce documents and litigate these proceedings without the imposition of a protective order.

Accordingly, The Regents requests that the Court adopt plaintiffs' Order Regarding Confidentiality attached as Exhibit 1, which conforms with General Order No. 2002-9 dated July 22, 2002.

DATED: September 24, 2002

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL, FACSIMILE OR UPS

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on September 24, 2002, declarant served the PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PRECLUDE THE FILING OR PRODUCTION OF DOCUMENTS SUBJECT TO A PROTECTIVE ORDER by sending via e-mail, facsimile or UPS overnight to the parties as indicated on the attached Service List, pursuant to the Court's August 7, 2002 Order Regarding Service of Papers and Notice of Hearings.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 24th day of September, 2002 at San Diego, California.

Mo Maloney

The Exhibit(s) May

Be Viewed in the

Office of the Clerk